Supreme Court, U.S.
FILED
AUG 6 1997
CLERK

No. 96-1337 (8)

In The

Supreme Court of the United States

October Term, 1996

COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, and JAMES EVERETT SMITH,

v. *Petitioners,*

TERI LEWIS and THOMAS LEWIS, Personal Representative of the Estate of PHILIP LEWIS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF ON THE MERITS OF AMICI CURIAE COUNTY OF RIVERSIDE, CITY OF LOS ANGELES, COUNTY OF SAN DIEGO, COUNTY OF KERN, COUNTY OF MENDOCINO, COUNTY OF PLUMAS, COUNTY OF SAN BERNARDINO, COUNTY OF SAN LUIS OBISPO, COUNTY OF SANTA CLARA, COUNTY OF SISKIYOU, COUNTY OF SONOMA, AND COUNTY OF TEHAMA IN SUPPORT OF PETITIONERS

JOHN J. SANSONE
County Counsel
County of San Diego
DIANE BARDSLEY
Chief Deputy
1600 Pacific Highway
Room 355
San Diego, CA 92101
(619) 531-4847

WILLIAM C. KATZENSTEIN
County Counsel
Office of County Counsel
County of Riverside
3535 10th Street,
Suite 300
Riverside, CA 92504
(909) 275-6300

JAMES K. HAHN
City Attorney
G. DANIEL WOODARD
Senior Assistant City Attorney
GREGORY P. ORLAND*
Deputy City Attorney
City of Los Angeles
200 North Main Street
18th Floor
Los Angeles, CA 90012-4131
(213) 485-5452

GREINES, MARTIN, STEIN & RICHLAND LLP
TIMOTHY T. COATES
9601 Wilshire Boulevard,
Suite 544
Beverly Hills, CA 90210
(310) 859-7811

*Counsel of Record

Attorneys for Amici Curiae

(Additional Amici Curiae Listed On Inside Cover)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

37 pp

Additional Amici Curiae

BERNARD C. BARMAN, SR.
County Counsel
County of Kern
1115 Truxtun Avenue,
Fourth Floor
Bakersfield, California
93301
(805) 861-2326

H. PETER KLEIN
County Counsel
County of Mendocino
JEANINE BENNETT NADEL
Deputy County Counsel
501 Low Cap Road,
Room 1030
Ukiah, California 95482
(707) 463-4446

ROBERT SHULMAN
County Counsel
County of Plumas
520 Main Street
Post Office Box 10388
Quincy, California
95971-6010
(916) 283-6240

ALAN K. MARKS
County Counsel
County of San Bernardino
MICHAEL A. SACHS
Chief Deputy County
Counsel
385 North Arrowhead
Avenue
San Bernardino,
California 92415-0140
(909) 387-5455

JAMES B. LINDHOLM, JR.
County Counsel
County of San Luis
Obispo
JAC A. CRAWFORD
Assistant County Counsel
County Government
Center
1035 Palm Street,
Room 386
San Luis Obispo,
California 93408
(805) 781-5400

STEVEN M. WOODSIDE
County Counsel
County of Santa Clara
JAMES RUMBLE
Chief Deputy
70 West Hedding Street,
9th Floor
San Jose, California
95110-1770
(408) 299-2111

FRANK J. DEMARCO
County Counsel
County of Siskiyou
304 Lane Street
Post Office Box 659
Yreka, California 96097
(916) 842-8100

JAMES P. BOTZ
County Counsel
County of Sonoma
575 Administration Drive,
Room 116A
Santa Rosa, California
95403-2881
(707) 527-2421

NELSON D. BUCK
County Counsel
County of Tehama
633 Washington
Post Office Box 8189
Red Bluff, California
96080
(916) 527-9252

TABLE OF CONTENTS

Page

BRIEF OF AMICI CURIAE..... 1

SUMMARY OF ARGUMENT..... 2

ARGUMENT 6

I. THE COURT SHOULD ADDRESS THE THRESHOLD ISSUE OF WHETHER THE LIABILITY OF POLICE OFFICERS STEMMING FROM POLICE PURSUITS FALLS WITHIN THE AMORPHOUS PROVISIONS OF THE FOURTEENTH AMENDMENT, OR WHETHER CONSTITUTIONAL CLAIMS ARE CONFINED TO THE EXPLICIT TEXTUAL LIMITATIONS OF THE FOURTH AMENDMENT..... 6

II. ANY RULE GOVERNING CONSTITUTIONAL LIABILITY ARISING FROM POLICE PURSUITS MUST REFLECT THE RELATIVELY LOW INCIDENCE OF SERIOUS INJURIES OR DEATHS RESULTING FROM PURSUITS AND THE SIGNIFICANT ROLE PURSUITS PLAY IN APPREHENDING THOSE WHO COMMIT THE MOST SERIOUS CRIMES..... 19

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

Albright v. Oliver, 510 U.S. 266 (1994)..... *passim*

Berman v. City of Daly City, 21 Cal. App. 4th 276, 26 Cal. Rptr. 2d 493 (1993) 17

Billester v. City of Corona, 26 Cal. App. 4th 1107, 32 Cal. Rptr. 2d 121 (1994) 17

Brower v. County of Inyo, 489 U.S. 593 (1989) 3, 4, 6, 11

Brumer v. City of Los Angeles, 24 Cal. App. 4th 983, 29 Cal. Rptr. 2d 515 (1994) 17

California v. Hodari, 499 U.S. 621 (1991)....4, 11, 12, 14, 16

Colvin v. City of Gardena, 11 Cal. App. 4th 1270, 15 Cal. Rptr. 2d 234 (1992) 17

Deshaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989) 15, 16

Dismukes v. Hackathorn, 802 F. Supp. 1442 (1992)..... 9

Estate of Story v. McDuffie County, 929 F. Supp. 1523 (1996), aff'd in an unpublished opinion, 110 F.3d 798 (11th Cir. 1997)..... 9

Graham v. Connor, 490 U.S. 386 (1989) 3, 6, 7, 8, 9

Hester v. United States, 265 U.S. 57 (1924)..... 15

Lewis v. Sacramento County, 98 F.3d 434 (9th Cir. 1996), cert. granted, 138 L.Ed.2d 173 (1997)..... 13, 18, 24

Montgomery v. County of Clinton, 743 F. Supp. 1253 (1990), aff'd in an unpublished opinion, 940 F.2d 661 (6th Cir. 1991)..... 9

TABLE OF AUTHORITIES – Continued

Page

Paul v. Davis, 424 U.S. 693 (1976), reh'g denied, 425 U.S. 985 (1976) 10

Payne v. City of Perris, 12 Cal. App. 4th 1738, 16 Cal. Rptr. 2d 143 (1993) 17

Rochin v. California, 342 U.S. 165 (1952)..... 14

STATUTES

California Vehicle Code section 17004 17

RULES

Supreme Court Rule 37.4 1

OTHER AUTHORITIES

INSURANCE INFORMATION INSTITUTE, THE FACT BOOK 1997 (1997)..... 23

Letitia E. Landry, Critics Sound Alarm Over Police Chases, The Sacramento Bee, July 6, 1995, at A12 22

Lightning . . . Natures Fireworks, National Weather Service, National Oceanic and Atmospheric Administration (1997)..... 21

Not Just Isolated Incidents, The Epidemic of Police Pursuits in Southern California (1996) 19, 20, 22, 24, 25, 27

TABLE OF AUTHORITIES – Continued

Page

Preliminary Pursuit Updates (1993, 1994, 1995)..... 22, 25, 27

The Evaluation of Risk, Initial Cause vs. Final Outcome in Police Pursuits, Business Transportation and Housing Agency Department of California Highway Patrol (Aug. 1995)..... 20, 22, 23, 24

Department Traffic Coordination Section, Traffic Analysis Unit (1993)..... 22, 27

BRIEF OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.4, by and through their authorized law officers, the County of Riverside, the City of Los Angeles, the County of San Diego, the County of Kern, the County of Mendocino, the County of Plumas, the County of San Bernardino, the County of San Luis Obispo, the County of Santa Clara, the County of Siskiyou, the County of Sonoma, and the County of Tehama, political subdivisions of the State of California, hereby submit the following brief in support of petitioners County of Sacramento, Sacramento County Sheriff's Department and James Everett Smith in the above case. Amici are public entities in the State of California, with a collective population of over 4 million residents. The decision of the Ninth Circuit Court of Appeals in this case holding that the conduct of police officers in initiating, conducting and terminating a vehicular pursuit is governed by the Due Process Clause of the Fourteenth Amendment, evaluated under a "deliberate indifference" or "reckless disregard" standard and is not subject to qualified immunity has a direct and substantial effect on these amici, whose law enforcement personnel must, by necessity, engage in vehicular pursuits on a regular basis.

In addition, the general principles of law addressed in the Ninth Circuit's opinion and presented for review to

this Court concerning the existence and nature of any constitutional claim arising from a police pursuit are of a substantial and continuing concern to these public entities, as well as public entities throughout the country.

SUMMARY OF ARGUMENT

1. This case presents an important threshold issue as yet unaddressed by the parties or the lower courts – whether the Fourteenth Amendment governs police pursuit claims that do not result in a Fourth Amendment seizure. As the decision of the Ninth Circuit in this case and those of the other circuit courts reveal, federal courts have routinely analyzed and permitted such claims under the guise of the "substantive due process" prong of the Fourteenth Amendment. Yet, a threshold question exists as to whether such claims are cognizable under the Fourteenth Amendment or any other provision of the Constitution. In *Albright v. Oliver*, 510 U.S. 266 (1994), the plaintiff, consistent with existing authority, asserted a malicious prosecution claim premised upon violation of the Due Process Clause of the Fourteenth Amendment. A plurality of this Court concluded however, that to the extent a malicious prosecution claim existed under the Constitution, it would fall within the confines of the Fourth Amendment. A similar blanket assumption has been made by the plaintiffs here, as well as the Ninth Circuit and other federal circuits, as to the applicability of the Fourteenth Amendment to police pursuits that fall short of seizure, but nonetheless result in injury to a suspect.

In *Graham v. Connor*, 490 U.S. 386, 395 (1989), this Court held that "*all* claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment . . . rather than under a 'substantive due process' approach." In *Albright*, a plurality of the Court reaffirmed this rule, holding that "[w]here a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process" must be the guide for analyzing these claims.' " *Albright*, 510 U.S. at 273 (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1986)). As the Court recognized in *Brower v. County of Inyo*, 489 U.S. 593 (1989), a police pursuit may result in liability under the Constitution within the parameters of the Fourth Amendment, where the suspect is seized, i.e., injured, as a result of intentional application of force by a police officer, such as creating a roadblock or running a suspect off the road. Amici submit that, consistent with *Graham*, *Albright* and *Brower*, the full measure of constitutional protection afforded to suspects who are pursued by police is governed by the Fourth Amendment – limiting liability to those situations where police officers intentionally take action to terminate the pursuit.

Applying an amorphous due process standard to pursuit claims that fall short of a seizure would not afford any greater protection than the Fourth Amendment. Conduct by police officers during a pursuit that would be sufficiently egregious and likely to produce injury to a suspect that it would constitute "deliberate indifference"

or "shock the conscience" under the Due Process Clause would, in most circumstances, create a jury question under *Brower* as to whether law enforcement officers intended to "seize" the suspect under the Fourth Amendment. Similarly, imposition of a due process standard would not be more likely to deter baseless pursuits by police officers than application of a Fourth Amendment standard. As the Court observed in *California v. Hodari*, 499 U.S. 621 (1991), in rejecting a similar claim, police officers do not initiate pursuits in the belief that a suspect will flee, much less do so in a dangerous manner. The remedy for an unlawfully initiated pursuit is simply to yield to the officer and then file suit premised upon the unlawful detention under the Fourth Amendment. Individuals do not, however, have a constitutional right to unilaterally determine the validity of a police officer's command to stop or to employ "self-help" by fleeing in a hazardous manner.

Police conduct in the context of vehicular pursuits that does not result in a seizure should not be actionable under some amorphous substantive due process standard, but instead be governed solely by state tort law. California has established strict criteria for the conduct of police pursuits, as well as liability rules designed to strike a balance between the clear need of law enforcement personnel to initiate and conduct pursuits, as well as the need to protect public safety. By essentially creating a constitutional cause of action premised upon conduct that is more properly subject to state tort law, the federal courts in general, and the Ninth Circuit specifically, have created an incentive to pursue such claims in the already overburdened federal courts.

2. Any rule governing constitutional liability arising from police pursuits, whether it be under the Due Process Clause, the Fourth Amendment or some other theory, must be framed in light of the risk (or relative lack thereof) of serious injuries caused by pursuits, as well as the significant role pursuits play in allowing law enforcement to apprehend those who commit the most serious crimes. Review of the hard statistical data reveals that an individual is far less likely to be killed or seriously injured in a police pursuit than by a drunk driver or in some other automobile accident. Indeed, the odds are greater that an individual would be struck by lightning than injured in a police pursuit. Moreover, research confirms what should be obvious – those who flee police are most likely to have committed serious crimes. In California, although 52% of pursuits began with a minor traffic infraction, 73% of those arrested were subsequently charged with felonies, and of that number, two-thirds were charged with a felony other than evading police. Thus, although a bare majority of pursuits may start as a traffic infraction, the overwhelming majority result in felony charges. In sum, as a general matter, the risks posed by police pursuits are strongly outweighed by their integral role in allowing police to apprehend the most serious offenders.

ARGUMENT

I.

THE COURT SHOULD ADDRESS THE THRESHOLD ISSUE OF WHETHER THE LIABILITY OF POLICE OFFICERS STEMMING FROM POLICE PURSUITS FALLS WITHIN THE AMORPHOUS PROVISIONS OF THE FOURTEENTH AMENDMENT, OR WHETHER CONSTITUTIONAL CLAIMS ARE CONFINED TO THE EXPLICIT TEXTUAL LIMITATIONS OF THE FOURTH AMENDMENT.

As previously noted, in *Albright v. Oliver*, 510 U.S. 266, the plaintiff had asserted a malicious prosecution claim premised upon violation of the Fourteenth Amendment. At the time, the circuit courts recognizing a malicious prosecution claim generally did so in the context of the Due Process Clause. *See Albright*, 510 U.S. at 270 n.4. Although the issue was not raised by the lower courts or the parties, a plurality of this Court concluded that to the extent the Constitution might give rise to some sort of claim for malicious prosecution, a plaintiff's rights rested within the more specific provisions of the Fourth Amendment, and not the Fourteenth Amendment.

Amici curiae submit that the lower federal courts are jumping to a similar conclusion with respect to liability for injuries arising from police pursuits that do not result in a seizure under *Brower v. County of Inyo*, 489 U.S. 593 (1989). While virtually all published decisions assume the existence of a substantive due process claim, amici submit that this Court's decisions in *Graham*, *Albright* and *Brower* make it clear that the full extent of liability to be imposed for police pursuits is defined by the Fourth Amendment, and that police conduct falling outside

those standards is squarely within the province of state tort law.

In *Graham* the Court expressed an intent to halt the use of amorphous substantive due process standards as a means of creating constitutional rights which were not fairly traceable to the Fourth Amendment. 490 U.S. at 393-95. The Court held that "*all* claims that law enforcement officers have used *excessive force* – deadly or not – in the *course* of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment . . . rather than under a 'substantive due process' approach." 490 U.S. at 395 (second and third emphasis added). In a concurring opinion Justices Blackmun, Brennan, and Marshall recognized the breadth of the holding, and refused to "join in foreclosing the use of substantive due process analysis in prearrest cases." *Id.* at 400.

Any doubt concerning *Graham*'s intent to foreclose the encroachment of the Due Process Clause on Fourth Amendment claims was removed in *Albright v. Oliver*, 510 U.S. 266, where a plurality of the Court held that the Fourth Amendment is the exclusive source of constitutional protection in *post-arrest* prosecutions. In *Albright*, a warrant was issued for the petitioner's arrest based on a previously filed criminal information charging the petitioner with the sale of a substance that looked like, but was not, an illegal drug. 510 U.S. at 268. After petitioner voluntarily surrendered, the court found probable cause to bind petitioner over for trial, but later dismissed the criminal action because the charge did not state an offense under state law. *Id.* at 269. Petitioner alleged that

under the Due Process Clause he had a protected " 'liberty interest' – to be free from criminal prosecution except upon probable cause." *Id.*

Applying the principles set forth in *Graham*, Chief Justice Rehnquist writing for the Court observed that a claim of criminal prosecution without probable cause is governed exclusively by the Fourth Amendment and not the " 'scarce and open-ended' " standards of substantive due process. *Albright*, 510 U.S. at 271-72 (citation omitted). The Court rejected petitioner's claim that a substantive due process analysis applies to any "arbitrary" use of governmental power. *Id.* at 272. The proper inquiry in the area of criminal procedure is not merely whether the governmental action was "arbitrary" under the Due Process Clause but whether the action was arbitrary under the standards set forth in the specific provision of the Bill of Rights which govern a particular setting. *Id.* at 272-74 ("[i]t was through [the] provisions of the Bill of Rights that [the] Framers sought to restrict the exercise of arbitrary authority by the Government in particular situations").

The Court's decisions and reasoning in *Graham* and *Albright* repudiate the decisions of the Ninth Circuit and other federal appellate courts allowing pursuit claims to be brought under the Due Process Clause in those circumstances where an injury does not result from the intentional application of force by a police officer. The federal courts' fragmentation of the arrest setting for purposes of applying amorphous due process standards to some portion of it is inconsistent with the Court's recognition in *Graham* that conduct leading up to an actual arrest may fall short of the actual use of physical

force, and yet still be governed exclusively by a Fourth Amendment analysis. *Graham*, 490 U.S. at 396 ("Fourth Amendment jurisprudence has long recognized that the right to make an arrest" entails "the right to use some degree of physical coercion or *threat thereof* to effect it"). It is also inconsistent with *Albright*'s determination that the entire arrest setting, including post-arrest proceedings, is analyzed under Fourth Amendment standards.

While the federal appellate courts have not yet recognized the sharp limitations *Graham* placed on encroachment of due process claims on the Fourth Amendment in the context of police pursuits, several district courts have applied *Graham* in foreclosing end runs around the strict terms of the Fourth Amendment. *See Estate of Story v. McDuffie County*, 929 F. Supp. 1523, 1528 (1996) (due process claim by motorist who lost control of car when pursued by officers barred, because mere pursuit, without intentional application of force did not rise to the level of a constitutional violation: "The Constitution does not create and the Supreme Court and the Eleventh Circuit have never found a right which prohibits the use of high-speed in an attempt to apprehend suspects who have resisted arrest by illegally fleeing in an automobile"), *aff'd in an unpublished opinion*, 110 F.3d 798 (11th Cir. 1997); *Dismukes v. Hackathorn*, 802 F. Supp. 1442, 1449 (1992) (third party injured in a collision with a vehicle being pursued by police officers cannot assert claim because no seizure occurred under the Fourth Amendment); *Montgomery v. County of Clinton*, 743 F. Supp. 1253, 1256-57 (1990) (mother of a motorist killed after being pursued by police could not assert a constitutional claim, since the Fourth Amendment provided an explicit textual

source for evaluating police conduct, and there was no seizure by police), *aff'd in an unpublished opinion*, 940 F.2d 661 (6th Cir. 1991).

The failure of the majority of the federal courts to follow *Graham* in the pursuit setting is in part attributable to the erroneous assumption that there must always be a constitutional remedy for "arbitrary" police conduct. *Paul v. Davis*, 424 U.S. 693, 698-700 (1976), *reh'g denied*, 425 U.S. 985 (1976) (the Due Process Clause does not provide a *constitutional* remedy for every legally cognizable injury under state law which a state official may inflict). As Justice Souter observed in *Albright*, even if substantive due process rights can be inferred in order to protect against " 'substantial arbitrary impositions and purposeless restraints,' " it is only where protection under the Due Process Clause would add a "substantial increment to protection" that is not otherwise available under the specific provisions of the Bill of Rights. 510 U.S. at 287 (Souter, J., concurring).

Justice Souter's reasoning underscores the impropriety of the approach taken by the lower federal courts with respect to police pursuits. A "substantial" increment of protection over that provided by the Fourth Amendment will *not* be added by fragmenting the arrest setting – pre-seizure conduct governed by the Due Process Clause and post-seizure conduct by the Fourth Amendment. The contours of the Fourth Amendment provide a more than adequate means to govern police conduct in the context of vehicular pursuits. For example, if a pursuing officer engages in egregious conduct highly likely to result in injury to a suspect during the course of a pursuit (such as hemming a vehicle in, or sideswiping it), then it

is more than likely that it will be at the very least a jury question as to whether the officer intended to "seize" the victim under the Fourth Amendment standards enunciated by this Court in *Brower*. *See* 489 U.S. at 598-99 ("In determining whether the means that terminates the freedom of movement is the very means that the government intended we cannot draw too fine a line, or we will be driven to saying that one is not seized who has been stopped by the accidental discharge of a gun with which he was meant only to be bludgeoned or by a bullet in the heart that was meant only for the leg"); *id*. at 597 ("If . . . the police cruiser had pulled alongside the fleeing car and sideswiped it, producing the crash, then the termination of the suspect's freedom of movement would have been a seizure"). No significantly greater protection is created by divorcing police pursuits from the Fourth Amendment analysis and instead creating out of whole cloth a substantive due process right not to be pursued in a manner that is somehow "deliberately indifferent" or "shocks the conscience."

Nor can imposition of an amorphous due process standard be justified on the assumption that it will act as a greater deterrent to potential abuse by police officers in the pursuit setting than limiting liability to the strict confines of the Fourth Amendment. In *California v. Hodari*, 499 U.S. 621, the Court rejected a criminal defendant's claim that mere initiation of a pursuit by a police officer should constitute a "seizure" for Fourth Amendment purposes so that the exclusionary rule would act as a deterrent to police officers initiating an improper stop simply in order to possibly obtain evidence. As Justice Scalia, writing for the Court, observed:

> Street pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged. Only a few of those orders, we must presume, will be without adequate basis, and since the addressee has no ready means of identifying the deficient ones it almost invariably is the responsible course to comply. Unlawful orders will not be deterred, moreover, by sanctioning through the exclusionary rule those of them that are *not* obeyed. Since policemen do not command 'Stop!' expecting to be ignored, or give chase hoping to be outrun, it fully suffices to apply the deterrent to their genuine, successful seizures. 499 U.S. at 627 (emphasis in original).

Similarly, here, in the context of vehicular pursuits by police, limiting constitutional liability to specific claims under the Fourth Amendment is unlikely to encourage abusive and otherwise unlawful conduct by police, since, as recognized by the Court in *Hodari*, presumably an officer initiates a traffic stop and subsequent pursuit for the very reason that he or she assumes the suspect will yield to the detention – thus resulting in a seizure under the Fourth Amendment. If the seizure is unlawful, i.e., not justified by probable cause or reasonable suspicion, then liability would surely follow under the Fourth Amendment. Thus, it is unlikely that any greater amount of potential police misconduct would be deterred by application of a due process as opposed to a Fourth Amendment standard.

In contrast, however, application of an amorphous "deliberate indifference" or even "shocks the conscience" standard under the Due Process Clause would likely

deter law enforcement officers from initiating and continuing pursuits even where there is clear justification or even necessity to pursue. For example, as the Ninth Circuit noted in this case, a "deliberate indifference" standard would allow a jury to impose liability where an officer's conduct in initiating and continuing a pursuit indicated a " 'conscious disregard' of public safety" by intentionally exposing someone to a known risk. *Lewis v. Sacramento County*, 98 F.3d 434, 441 (9th Cir. 1996), *cert. granted*, 138 L. Ed. 2d 173 (1997). Yet, pursuing an individual who is fleeing at a high rate of speed or perhaps ignoring traffic regulations necessarily means that an officer is intentionally exposing the suspect to a known risk. The risk is that the suspect will lose control of the vehicle, perhaps run into another automobile or, even be struck by the police vehicle should he stop in circumstances that do not provide the officer a reasonable opportunity to avoid a collision. Similarly, with the clear vision of hindsight, a jury could well conclude that it "shocks the conscience" for a police officer to pursue a teenager fleeing at a high rate of speed who merely committed a traffic infraction, if the result of the pursuit is that the teenager loses control of the vehicle and dies in the ensuing crash.[1]

---

[1] An open-ended due process standard, whether it be "deliberate indifference" or "shocks the conscience," also leaves an officer open to rampant second-guessing by courts and juries in circumstances where, *at the time the police officer's decision is made*, he or she could *never know* whether the public safety would be greater served by continuing or terminating a pursuit. For example, if an officer initiates a traffic stop of a teenage motorist who then flees at a high rate of speed on a crowded highway or even a suburban street, he or she has two choices.

Application of the Fourteenth Amendment to police pursuits effectively creates the very sort of constitutional claim for pre-seizure conduct that the Court rejected in *Hodari*. It makes no sense to suggest that evidence would somehow not be excludable under the Fourth Amendment merely because it was dropped by defendant during an unjustified pursuit without a seizure, yet, nonetheless, hold that under identical circumstances a constitutional claim might be asserted because the pursuit violated due process. Such an analysis would most certainly give rise to motions to exclude evidence in the *Hodari* context based not upon the Fourth Amendment, but upon the Fourteenth Amendment. *Cf. Rochin v. California*, 342 U.S. 165, 172-73 (1952) (evidence obtained by stomach pumping must be excluded because conduct of officers "shocks the conscience" under the Fourteenth Amendment).

The officer could continue the pursuit and perhaps pose a risk of danger to the suspect (i.e., that he will lose control of the vehicle or collide with the officer or another vehicle) or even pose a threat to vehicles in the immediate vicinity. Alternatively, the officer could terminate the chase and hope that the fleeing driver realizes *at some point* that he is no longer being pursued, reduces speed and stops driving in a hazardous or reckless manner. However, there is always the risk that the fleeing driver will not immediately realize he is no longer being pursued, continue to flee in a reckless manner and subsequently collide with a vehicle hundreds of yards or even miles after police have terminated the pursuit. Add to the mix that it is possible that a pursuing officer's lights and sirens might have warned other drivers of the suspect's approach. Can it rationally be contended that as a matter of constitutional doctrine, a police officer must err on one side, i.e., abandoning the chase, as opposed to the other? Or, alternatively, that the *constitutionality* of the officer's conduct is determined by which course a trier of fact concludes would have been better under the circumstances?

The entire notion that an individual has some sort of "liberty interest" not to be pursued under particular circumstances is flatly contrary to the Court's strict limitation on liability under substantive due process. As the Court noted in *Deshaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the Due Process Clause may impose liability on the government or its employees when they act to "restrain" personal liberty, or possibly "create" a particular danger to a specific individual. *Id.* at 199-201. Yet merely initiating and continuing a pursuit does not "restrain" an individual's liberty any more than it "seizes" an individual for purposes of the Fourth Amendment under *Hodari*. The pursuit is an *attempt* to restrain liberty, not a restraint itself. Similarly, under those circumstances, the government actor has not "created" any danger to the fleeing suspect. Any danger is created by the suspect's flight, not the mere pursuit. *Cf. Hester v. United States*, 265 U.S. 57, 58 (1924) (alcohol containers dropped by moonshiners during pursuit not subject to exclusion because "[t]he defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle"). Quite simply, it is the party being pursued who dictates the nature of the police officer's conduct. As was obvious from viewing perhaps the most widely reported and infamous police pursuit in history, if an ex-football player wants to flee police officers in a white Bronco at 35 miles an hour, the police officers will pursue at 35 miles an hour. It is only where a suspect flees at high speed and ignores proper traffic regulations that officers are forced to accelerate.

Moreover, recognition of a due process right not to be pursued suggests that in some circumstances an individual may be justified in failing to yield to authority. Yet, even assuming there are circumstances where police officers initiate pursuit for improper reasons, it defies logic to suggest that an individual has a right not to yield to the police officer, much less to violate speed and traffic regulations by fleeing. As the Court recognized in analogous circumstances in *Hodari*, if a police officer pulls an individual over for no reason, i.e., lacks probable cause or even a reasonable suspicion, then an individual need only yield to the police officer, suffer the detention, and sue for the resulting Fourth Amendment violation. But it simply cannot be the case that an individual may unilaterally determine whether or not a police officer has a reasonable basis to stop his or her vehicle, much less exercise "self-help" and put the general public in danger by fleeing in a dangerous manner.

The Fourth Amendment provides clear standards for evaluating the entire panoply of police conduct, and for imposing liability in those circumstances where the most egregious of conduct results in injury. There is simply no need to create an amorphous constitutional standard under the Due Process Clause in order to provide redress for perceived police misconduct in initiating and conducting a pursuit. That is the province of state tort law. As the Court observed in *Deshaney*:

> The people of [the state] may well prefer a system of liability which would place upon the State and its officials the responsibility for failure to act in situations such as the present one. They may create such a system, if they do not

> have it already, by changing the tort law of the State in accordance with the regular law-making process. But they should not have it thrust upon them by this Court's expansion of the Due Process Clause of the Fourteenth Amendment. 489 U.S. at 203.

California, like other states, has created a rigorous statutory scheme covering liability of police officers and public entities for injuries resulting from the initiation, conduct and termination of police pursuits.[2] These state statutes strike a balance between the clear need of police officers to engage in pursuits without fear of entanglement in litigation, yet at the same time require that consideration be given to the hazard posed not simply to

---

[2] California Vehicle Code section 17004 immunizes public employees from liability for injuries caused by emergency pursuits in authorized vehicles in the line of duty. Section 17004.7 immunizes a public entity from liability in such cases if the law enforcement agency in question has adopted a written pursuit policy containing specific criteria to be used by officers in determining whether to initiate, continue or terminate a pursuit, provides for supervisory control of the pursuit, coordination with other jurisdictions and procedures for establishing the number and priority of pursuit vehicles. *See Billester v. City of Corona*, 26 Cal. App. 4th 1107, 32 Cal. Rptr. 2d 121 (1994) (public entity entitled to immunity; pursuit policy adequate); *Brumer v. City of Los Angeles*, 24 Cal. App. 4th 983, 29 Cal. Rptr. 2d 515 (1994) (same); *Berman v. City of Daly City*, 21 Cal. App. 4th 276, 26 Cal. Rptr. 2d 493 (1993) (no immunity; pursuit policy lacks specific criteria for initiating and terminating pursuit); *Payne v. City of Perris*, 12 Cal. App. 4th 1738, 16 Cal. Rptr. 2d 143 (1993) (same); *Colvin v. City of Gardena*, 11 Cal. App. 4th 1270, 15 Cal. Rptr. 2d 234 (1992) (no immunity; policy lacks procedure for determining number and priority of pursuing vehicles).

suspects, but to the public at large. It is difficult to see what additional modicum of protection the creation of a due process claim out of whole cloth provides over and above state law.

In addition, the existence of more generous and indeed open-minded standards of liability governing these amorphous constitutional claims necessarily means that litigants will elect to proceed on federal claims in federal court instead of confining themselves to state tort remedies in state courts. In an era in which the federal courts are already overburdened, the utility in creating another constitutional cause of action would seem to be marginal at best, especially in light of a more than adequate state tort law scheme to address the same conduct.

As indicated by *Lewis* and the decisions of the other federal appellate courts, the Due Process Clause is again being expanded to encompass claims that for constitutional and policy reasons are best left to state law. It is therefore essential that this Court address the important threshold question of whether the Fourteenth Amendment applies to police pursuits.

II.

ANY RULE GOVERNING CONSTITUTIONAL LIABILITY ARISING FROM POLICE PURSUITS MUST REFLECT THE RELATIVELY LOW INCIDENCE OF SERIOUS INJURIES OR DEATHS RESULTING FROM PURSUITS AND THE SIGNIFICANT ROLE PURSUITS PLAY IN APPREHENDING THOSE WHO COMMIT THE MOST SERIOUS CRIMES.

As previously noted, amici submit the full extent of constitutional liability for police pursuits is measured by the specific protections of the Fourth Amendment. However, in crafting a rule of liability under either the Fourth Amendment, or even the open-ended standards of the Due Process Clause, amici note that it is critical to have an accurate understanding of the nature of the risks involved in police pursuits, as well as the importance of pursuits to everyday law enforcement activity.

As a threshold matter, amici observe that various groups, including the American Civil Liberties Union, have made a concerted effort to eliminate or vastly reduce police pursuits as a matter of policy.[3] Specifically, these groups contend that police pursuits are inherently

---

[3] The American Civil Liberties Union (ACLU) Foundation of Southern California issued a "report" in June 1996, *Not Just Isolated Incidents, The Epidemic of Police Pursuits In Southern California* (hereinafter sometimes *ACLU Report*). As discussed, *infra*, the ACLU report often misstates or misconstrues data, and its underlying conclusions concerning the number of pursuits that result in injury, the severity of injuries and its recommendations concerning revisions in police pursuit practices, are dubious at best.

dangerous, likely to lead to serious injury, and are generally unjustified except in those circumstances where an officer can confirm that the driver of the vehicle being pursued has committed a serious, violent felony.

As we discuss below, the State of California collects specific data with respect to police pursuits, and amicus City of Los Angeles has compiled its own data in monitoring not simply the number of police pursuits, but the severity of injuries resulting from such pursuits. This highly specific data from California, along with the national data, make it clear that the number of deaths and serious injuries resulting from police pursuits is vastly overstated. At the same time, the data confirm what common sense would lead any individual to believe – that those individuals who flee the police have generally committed serious crimes.

The assertions regarding a purportedly large number of pursuit deaths and injuries are misleading and inaccurate. In 1993, 38 people in California died during police pursuits, 8 of whom were uninvolved victims. *The Evaluation of Risk, Initial Cause vs. Final Outcome in Police Pursuits*, Business Transportation and Housing Agency Department of California Highway Patrol (Aug. 1995) at 43[4] (hereinafter *CHP Study*). That same year, 1,600 people in California died in alcohol related collisions. *Id.* The *CHP Study* put the risk of injury and death from 1994 police pursuits into proper perspective by comparing it to

---

[4] Although the *CHP Study* is limited to 1994, while the *ACLU Report* covers the years 1993-1995, inclusive, the *ACLU Report's* own numbers demonstrate the data for each of the three years is similar.

the risk of injury and death from collisions and driving under the influence (DUI) collisions.

	Collision	DUI Collision	Pursuit Collision
Injured	1 in 101	1 in 739	1 in 86,729
Killed	1 in 7,625	1 in 20,231	1 in 3,967,859

Not surprisingly, the risk of being injured in a police pursuit is substantially less than other types of automotive injuries. For example, the risk of being injured by an alcohol impaired driver is 117 times greater than being injured in a police pursuit. Similarly, a person is almost 860 times more likely to be injured in an ordinary traffic collision than in a police pursuit.

This data establishes that the risk of being killed or injured in a California police pursuit is minimal. The chances of any person being killed in a police pursuit are one in almost four million. In contrast, there is a 1 in 600,000 chance of being struck by lightning, meaning there is roughly a 6.6 times greater chance of being struck by lightning than dying in a California police pursuit. *Lightning . . . Nature's Fireworks*, National Weather Service, National Oceanic and Atmospheric Administration (1997) at 1.

Moreover, the data suggest the severity of injuries resulting from police pursuit is generally overstated. The Los Angeles Police Department statistics analyze the

severity of injuries in police pursuits.[5] From 1993 to 1995, inclusive, the Los Angeles Police Department engaged in 2,549 pursuits. *Preliminary Pursuit Updates* (1993, 1994, 1995) Los Angeles Police Department Traffic Coordination Section, Traffic Analysis Unit, at 1 (1993), at 1 (1994), at 1 (1995). These pursuits resulted in a total of 518 injuries, 47 (9.2%) of which were categorized as "serious." *Id.*[6]

National Statistics confirm that the risk of death from police pursuits is overstated. The National Highway Traffic Safety Commission collects data only on collisions that result in death which occur in the 50 states, the District of Columbia and Puerto Rico and these data are compiled in the Fatal Accident Reporting System (FARS). *CHP Study* at 20. The FARS data for a nine year period, from 1985-1993, inclusive, amply demonstrate that the risk of dying from a police pursuit collision is not of epidemic proportions. There are an estimated 250,000 police pursuits annually. Letitia E. Landry, *Critics Sound Alarm Over*

---

[5] The *ACLU Report* draws no distinction between very minor, almost trivial injuries, and very serious injuries. Thus, although at Table 1-1, the *ACLU Report* states that its survey of four law enforcement agencies revealed that 68 police officers, 579 suspects and 262 other individuals were "injured" in police pursuits this means very little because the report cannot and does not indicate the severity of the injuries in question.

[6] The Los Angeles Police Department categorizes injuries as A (serious injury), B (visible injury), and C (complained of pain). *See, i.e., Preliminary Pursuit Updates* (1993) Los Angeles Police Department Traffic Coordination Section, Traffic Analysis Unit, at 3 n.c. Injuries that are classified as visible or complained of pain (B and C injuries) are considered by the Los Angeles Police Department to be minor or very minor, respectively.

Police Chases, The Sacramento Bee, July 6, 1995, at A12. The data indicate that approximately 1% of these pursuits resulted in fatalities. In the nine year FARS study period, 2,707 people died in police pursuits. Of these fatalities, 2,156 (79%) were the suspect, 530 (20%) were uninvolved persons, and 21 (1%) were police officers. *CHP Study* at 20-21. Thus, a mean average of 2 police officers, 240 suspects, and 59 uninvolved persons, died per year in police pursuits. *Id.* at 20. In stark contrast, in 1993 alone 19,557 people in the United States lost their lives on the nation's highways in alcohol related traffic collisions. INSURANCE INFORMATION INSTITUTE, THE FACT BOOK 1997 (1997) at 103.

Amici of course, are not attempting to trivialize the risk of injuries or death during police pursuits. Rather, amici are merely putting the risk of injuries or death from pursuits into perspective. Quite simply, the risk of injury or death from police pursuits is vastly overstated and the likelihood of serious injury or death from police pursuits is substantially less than other forms of automotive injuries.

Any rule of liability governing police pursuits must also be framed with an understanding that the majority of pursuits – even those that are initiated for "minor" traffic violations – result in the apprehension of individuals who have committed the most serious crimes. A failure to understand this fact has led courts and commentators to suggest, for example, that because of their "dangerous" nature, police pursuits should be permitted only where the pursued vehicle was involved in a violent felony or, at the very least, that the gravity of the offense be a

determinative factor in evaluating the constitutional propriety of the officer's conduct.[7]

Yet such a sharp restriction of police pursuits is ill-conceived. In 1994, in California alone there were 5,339 pursuits of which 52% began with a minor traffic violation, but resulted in 73% of those apprehended being charged with felonies. *CHP Study* at 8-9. Of those suspects at least 66% were arrested for a felony other than evading police. *Id.* at 27.[8] Indeed, only 1% of those pursuits which began with an infraction resulted in the suspect being charged only with an infraction. *Id.* at 9. Thus in 1994 alone, in California 670 individuals subsequently charged with murder or lesser forms of killing, rape, kidnapping, robbery or assault were taken into custody

---

[7] The *ACLU Report* suggests pursuits should be initiated as a "last resort" and limited to apprehension of those committing "serious violent felonies including murder, assault, robbery, rape, and kidnapping." *ACLU Report* at 11-12. The Ninth Circuit's decision in this case seemingly embraces this Draconian restriction. The court stated: "This is not a case in which officers were pursuing dangerous felons. The record does not indicate that Lewis or Willard would have posed a risk to public safety had they gotten away." *Lewis v. Sacramento County*, 98 F.3d 434, 442 (9th Cir. 1996), *cert. granted*, 138 L. Ed. 2d 173 (1997).

[8] A substantial flaw in the *ACLU Report* is that it ignored an inherent limitation in the Statewide Pursuit Information Database Resource (SPIDR) data. The system requires only that a single charge be listed in the report. Thus, in pursuits where multiple felony violations occur, or felonies and multiple misdemeanors occur, only the single most serious charge will be listed. *CHP Study* at 5, 27. Accordingly, even though evading may be the only charge reported to SPIDR, the suspect could have been charged with other offenses.

following pursuits which started with traffic infractions. *Id.* at 10.

Moreover, anecdotal evidence further supports the commonsense conclusion that police pursuits prompted by an infraction lead to the arrest of extremely dangerous felons:[9]

> On February 16, 1995, Sacramento County Sheriff's deputies attempted to stop a vehicle for an infraction, an expired registration. The vehicle fled and after a brief pursuit it collided with a parked car. A carjacking victim with a bullet wound in the neck was found alive in the stolen vehicle's trunk. *CHP Study* at 29.
>
> On March 20, 1995, Glendale, California police officers attempted to stop a vehicle for running a stop sign. After a very brief pursuit,

---

[9] The *ACLU Report* claims that instead of pursuing a suspect, the use of other technologies such as helicopters would be a proper alternative. *ACLU Report* at 14. The recommendation is unrealistic. In 1993 and 1994, only about 40% of Los Angeles police pursuits could be airship assisted. In Los Angeles in 1995 and 1996, only 33% of pursuits could be airship assisted. *Preliminary Pursuit Updates* (1993, 1994, 1995, 1996) Los Angeles Police Department Traffic Coordination Section, Traffic Analysis Unit, at 1 (1993), at 1 (1994), at 2 (1995), at 1 (1996).

On a national scale, the *ACLU Report's* recommendation is impractical. Many geographically smaller or cash strapped police departments could not use a helicopter. The use of helicopters in lieu of vehicle pursuits would be worthless in certain terrain or in certain weather conditions. Similarly, the ACLU's assertion that an increased use of radio communication will lead to the apprehension of suspects without the necessity of a pursuit is wrong. The radio is simply a communications device; it cannot stop a suspect. Sooner or later an officer will be required to engage the suspect.

the vehicle came to a forced stop. The suspect driver was wanted for four counts of murder and four counts of armed robbery. The passenger was wanted for a parole violation. *Id.* at 30.

On April 9, 1993, Torrance, California police officers attempted to stop a motorcycle for a speed violation. When the suspect was apprehended after a pursuit the officers learned that there was an outstanding murder warrant for the suspect. *Id.* at 31.

On June 11, 1993, Simi Valley police officers observed a motorcycle rider without a helmet in violation of state law. The officers attempted to stop the suspect and he fled. After the suspect was apprehended the officers discovered that there were three outstanding warrants for his arrest; he was also wanted for brandishing and assault with a deadly weapon. *Id.*

On February 12, 1995, CHP officers in Los Angeles attempted to stop a vehicle for a speed violation. After a brief pursuit one of the suspects was taken into custody. The officers subsequently learned that the suspects were wanted for carjacking, armed robbery, attempted murder, kidnapping, and assault with a deadly weapon. These crimes occurred just before the officers attempted to make the infraction stop. *Id.* at 32.

A rule of liability that effectively restricts pursuits to serious violent felonies would handcuff law enforcement, and create substantial risks to the public. For example, under the "violent felony" rule, police officers could not pursue alcohol impaired drivers who chose to flee because the crime was not a serious violent felony. Yet,

alcohol impaired drivers are among the greatest causes of highway fatalities year after year. INSURANCE INFORMATION INSTITUTE, THE FACT BOOK 1997 (1997) at 89, 629 (between 1985 and 1994, inclusive, approximately 42,000 people per year died in highway accidents, of which approximately 39% of the fatalities were alcohol related). Quite simply, even so-called non-violent offenses have enormous potential to cause serious injuries or death.[10]

Plainly, the data confirm that the chances of any person being killed or injured in any single pursuit are slight. If the fleeing suspect is factored out from the data, then the chances of any police officer or uninvolved person being killed or seriously injured during a pursuit are extremely remote. In contrast, the number of serious criminals apprehended in pursuits – including pursuits initiated as a result of a "mere" infraction – is significant.

---

[10] The ACLU's reasoning is substantially flawed in other respects. The *ACLU Report*, at 8, states in reference to Table 1-7, which compares initial violations to final charges between the Los Angeles Police Department and the Riverside County Sheriff Department, that the LAPD data encompasses the final six months of 1995 and the sheriff's department data encompasses all of 1995. In actuality, the Los Angeles Police Department data were for all of 1995. *Preliminary Pursuit Updates* (1995) Los Angeles Police Department Traffic Coordination Section, Traffic Analysis Unit at 2. The *ACLU Report* at 8, Table 1-7 for example, also confuses the distinct concepts of booking charges and charges actually filed. SPIDR data and arrest data deal only with booking charges. The *ACLU Report*, however, misinterpreted the data and falsely asserted that the charges were those that were "actually filed."

Any rule governing liability for police pursuits must be framed in light of these factors.

CONCLUSION

For the foregoing reasons, amici respectfully submit that the judgment of the Ninth Circuit should be reversed.

Dated: August 6, 1997.

Respectfully submitted,

WILLIAM C. KATZENSTEIN
County Counsel
County of Riverside

JAMES K. HAHN
City Attorney
City of Los Angeles
G. DANIEL WOODARD
Senior Assistant City Attorney
GREGORY P. ORLAND*
Deputy City Attorney

JOHN J. SANSONE
County Counsel
County of San Diego
DIANE BARDSLEY
Chief Deputy

BERNARD C. BARMAN, SR.
County Counsel
County of Kern

H. PETER KLEIN
County Counsel
County of Mendocino

JEANINE BENNETT NADEL
Deputy County Counsel

ROBERT SHULMAN
County Counsel
County of Plumas

ALAN K. MARKS
County Counsel
County of San Bernardino
MICHAEL A. SACHS
Chief Deputy County Counsel

JAMES B. LINDHOLM, JR.
County Counsel
County of San Luis Obispo
JAC A. CRAWFORD
Assistant County Counsel

STEVEN M. WOODSIDE
County Counsel
County of Santa Clara
JAMES RUMBLE
Chief Deputy

FRANK J. DEMARCO
County Counsel
County of Siskiyou

JAMES P. BOTZ
County Counsel
County of Sonoma

NELSON D. BUCK
County Counsel
County of Tehama

GREINES, MARTIN, STEIN &
RICHLAND LLP
TIMOTHY T. COATES

*Counsel of Record

Attorneys for Amici Curiae County of Riverside, City of Los Angeles, County of San Diego, County of Sacramento, County of Kern, County of Mendocino, County of Plumas, County of San Bernardino, County of San Luis Obispo, County of Santa Clara, County of Siskiyou, County of Sonoma, and County of Tehama